Office of Chief Counsel
Internal Revenue Service

memorandum

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date: AUG 10 2000

to: Chief, Appeals
Connecticut-Rhode Island District
Attn: Richard Geltzer

from: District Counsel, Connecticut-Rhode Island District, E. Hartford

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subject: [redacted]

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In response to a memorandum from Appeals Officer Richard Geltzer dated May 15, 2000, we believe that the Service is entitled to levy upon the taxpayers' assets to collect the outstanding [redacted] and [redacted] tax liabilities. Further, the Service is not legally obligated to release the tax liens pertaining to the taxpayers' [redacted] and [redacted] tax liabilities. However, we recommend that the Service consider subordinating its [redacted] tax lien to give priority to [redacted] for this debt.

FACTS

We base our opinion upon the following facts as disclosed by Mr. Geltzer's memorandum and through discussions with him and SPf Advisor Margaret Coughlin: The Service assessed income tax liabilities against the taxpayers, [redacted], for the taxable years [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted] on [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted], in the respective amounts of $[redacted], $[redacted], $[redacted], $[redacted], $[redacted], $[redacted], and $[redacted]. The Service filed Notices of Federal Tax Lien at the [redacted] Connecticut land

records office for the [redacted] through [redacted] liabilities on [redacted], and for the [redacted], [redacted], [redacted], and [redacted] liabilities on [redacted], [redacted], [redacted], and [redacted], respectively.

The taxpayers filed for Chapter 7 bankruptcy on [redacted], and received a discharge on [redacted] discharging their [redacted] through [redacted] liabilities under 11 U.S.C. § 727. Thereafter, the Service contacted the taxpayers to enforce the liens filed against their residence located at [redacted]. The liens, unlike the underlying liabilities, were not discharged by the Chapter 7 proceeding.

To pay these liabilities, the taxpayers proposed to refinance their home. On [redacted], the taxpayers' attorney, [redacted], sent a letter to Revenue officer Bill Niedziela offering to pay the Service between $[redacted] and $[redacted] from the refinancing transaction in exchange for the Service releasing the liens against the property. On [redacted], the revenue officer sent a FAX to SPf Advisor Wayne Falk referencing this offer. After discussing the matter with Mr. Falk, the revenue officer prepared a calculation of the amount to be paid to the Service which indicated that the Service should receive $[redacted] based upon the forced sale value of the property and the payoff of prior mortgages and closing costs.[1/]

On [redacted], the revenue officer sent a letter to Attorney [redacted] stating that the Service's lien attached to equity in the property worth $[redacted]. The letter also stated that "A release of lien will be issued in exchange for payment of $[redacted]." Neither this letter nor Attorney [redacted]'s prior letter indicated which taxable periods the release related to. However the revenue officer's history sheets indicate that he contemplated releasing more than one lien on the property.

It appears that the taxpayers' case was reviewed by the revenue officer's manager but it is unclear whether the manager or Wayne Falk reviewed the letter sent to Attorney [redacted]. There is no evidence that the Chief of SPf or other higher level Service officials knew about the proposed release or the letter sent by the revenue officer.

On or about [redacted], the taxpayers refinanced their property and granted a mortgage in favor of [redacted] which was recorded on [redacted]. On [redacted], the Service received $[redacted] from the

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[1/] This calculation was also FAXED to Wayne Falk.

transaction which was applied to pay off the [redacted], [redacted] and [redacted] liabilities in full and a portion of the [redacted] liabilities. Thereafter, the Service abated the [redacted] through [redacted] liabilities as they were discharged by the Chapter 7 proceeding and released the liens for these periods. As the [redacted] and [redacted] liabilities remained unsatisfied and were not dischargeable, the Service did not abate the liabilities for these periods or release the lien for [redacted]. Presently, these liabilities remain unsatisfied.

Thereafter, on or about [redacted], the Service filed a lien for the [redacted] liability and sent a collection due process hearing notice to the taxpayers notifying them of their right to contest the Service's action.[2/] The taxpayers failed to file a request for a collection due process hearing regarding this action within 35 days of the lien filing date as required by I.R.C. § 6320(a)(2).

On [redacted], the Service issued a Final Notice of Intent to Levy to the taxpayers proposing to levy upon their property to collect the [redacted] and [redacted] liabilities. On [redacted], the taxpayers filed a request for a collection due process hearing with the Service's Appeals Division contesting the Service's proposed levy action. In their request for a hearing, the taxpayers' attorney alleged that the Service had agreed to extinguish the [redacted] and [redacted] liabilities and release the [redacted] lien in exchange for the $[redacted] paid to the Service.

LEGAL DISCUSSION

The Service's lien attaches to all property and rights to property owned by a taxpayer on the date of assessment and property subsequently acquired. I.R.C. § 6321; Treas. Reg. § 301.6321-1. The Service may levy upon all assets owned by a taxpayer to which the federal tax lien attaches excluding certain exempt assets. I.R.C. §§ 6331, 6334.

Generally, the government cannot be sued for its actions in the absence of a statutory or regulatory provision waiving the doctrine of sovereign immunity. United States v. King, 395 U.S. 1 (1969); Buesing v. United States, 42 Fed Cl 679 (Cl Ct 1999). To allow for recovery, the statutory or regulatory provision must contain language indicating that recovery from the government is permissible. United States v. Mitchell, 463 U.S. 206 (1983). In

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[2/] The Service did not retain the notice sent to the taxpayers in accordance with established procedure. However, the standard procedure followed by the Service is to issue this notice to the taxpayer when the lien is filed.

the present case, the relevant statutory provisions are I.R.C. §§ 7121 and 7122, which allow the Service to enter into closing agreements and compromises of outstanding tax liabilities. To prevail in this case, the taxpayers must establish that the Service agreed to release the liens and abate the liabilities at issue in accordance with these statutes. For the reasons discussed below, we believe that the taxpayers cannot defeat the proposed levy action on this basis.

First, the revenue officer never agreed to abate the subject liabilities. Although there is correspondence between the parties stating that the liens against the property would be released upon payment of the taxpayers' realizable equity, this promise appears to relate to the liens filed by the Service with the [redacted], not the assessment lien imposed by I.R.C. § 6321. The parties' correspondence does not contemplate abating the assessments or releasing the § 6321 statutory lien attaching to all of the taxpayers' property. Instead, it appears that the parties contemplated releasing liens filed against the taxpayers' residence in order to allow the taxpayer to refinance it. The parties' calculations of the amount due based upon the property's estimated value underlines this point.

In this regard, it appears that the taxpayers are confusing the effect of releasing liens with abating liabilities. Regardless of whether the Service releases its liens for the [redacted] and [redacted] liabilities, it nevertheless may still collect these liabilities as they were not abated. Moreover, unlike the [redacted] through [redacted] liabilities, the [redacted] and [redacted] liabilities were not discharged by the Chapter 7 proceeding. 11 U.S.C. §§ 727, 523(a).[3/] Hence, the Service may levy upon the taxpayers' property to collect these liabilities as the underlying assessments are still valid.

Second, the revenue officer could not bind the Service contractually as he lacked the authority to compromise the liabilities at issue or enter into a closing agreement. In order to bind the government, a person making an agreement on behalf of the Service must have authority to do so. Buesing v. United States, 42 Fed Cl 679 (Ct. Cl. 1999; El Centro v. United States,

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[3/] The [redacted], [redacted], [redacted] and [redacted] liabilities were discharged by the Chapter 7 proceeding as the returns for these years were due more than three years before the date that the Chapter 7 petition was filed. 11 U.S.C. §§ 507(a)(8); 523(a). The liens related to these taxable years, however, survive the Chapter 7 proceeding and are enforceable. See e.g., In re Isom, 901 F.2d 744 (9th. Cir. 1990).

922 F.2d 816, 820 (Fed. Cir. 1990). Under I.R.C. §§ 7121 and 7122, only the Secretary of the Treasury and certain designated Service officials may compromise a tax liability or enter into a closing agreement.[4/] These designated representatives, identified by Delegation Order Nos. 11 and 97, include the Chief of Special Procedures Function and group managers but do not include revenue officers. Dorl v. Commissioner, 507 F.2d 406 (2d Cir. 1974); Benson v. United States, 934 F. Supp. 365 (D. Co. 1996).[5/]

In addition, the taxpayers cannot claim that the Service agreed to compromise the liabilities at issue as the formal requirements of I.R.C. § 7122 were not met. For example, the Service did not obtain the opinion of District Counsel regarding the legal sufficiency of the alleged agreement to compromise the liabilities, a requirement under I.R.C. § 7122(b). Benson v. United States, 934 F. Supp. at 369; In re Southern Pump & Supply, Inc., 43 B.R. 182 (Bkrtcy. M.D. Fl. 1984). The requirements of § 7122 must be strictly followed in order for a tax liability to be compromised. Botany Worsted Mills v. United States, 278 U.S. 232 (1929); Bowling v. United States, 510 F.2d 112 (5th Cir. 1975).

Besides alleging that the Service violated an agreement to compromise the liabilities, the taxpayers may attempt to defeat the levy action by asserting that the Service is equitably estopped from collecting the liabilities. Unlike a contractual claim, equitable estoppel may be asserted against the government regardless of sovereign immunity. See Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982). To prove equitable estoppel the taxpayers must establish the following: (1) the Service misrepresented the facts; (2) they reasonably relied upon the misrepresentation; (3) their reliance on the misrepresentation caused them detriment and (4) the government's actions amounted to "affirmative misconduct". United States v. Asmar, 827 F.2d 907 (3rd Cir. 1987); Corneil-Rodriguez v. INS, 532 F.2d 301 (2d. Cir. 1976).

[4/] The Attorney General may also compromise a tax liability after a case is referred to the Department of Justice. I.R.C. § 712(a).

[5/] It appears that the revenue officer's superiors were unaware of any offer to compromise the liabilities at issue. Thus, the taxpayers cannot claim that a duly authorized official approved of any agreement to compromise the liabilities at issue.

Although it appears that the taxpayers were misled in some fashion by the revenue officer, thereby satisfying the first element of equitable estoppel, they do not satisfy the remaining three elements. The revenue officer never promised to abate the subject liabilities, thereby preventing any reliance upon him. Further, even if he represented that he would abate the liabilities, his lack of authority to do this made the taxpayers' reliance upon him unreasonable. Kennedy v. United States, 965 F.2d 413 (7th. Cir. 1992); Benson v. United States, 934 F. Supp. 365 (D. Co. 1996).

Likewise, the taxpayers failed to show that they suffered a detriment by relying upon the revenue officer's alleged misrepresentation. To prove a detriment, the taxpayers must show that they changed their position as a result of the government's action and relinquished something which they were legally entitled to retain. Heckler v. Community Health Services Inc., 467 U.S. 51 (1984); Kennedy v. United States, 965 F.2d at note 2. Based on the facts presented, there is no evidence that the taxpayers lost any rights or suffered a legal detriment due to the revenue officer's actions. Although the taxpayers paid off a portion of their liability as a result of the revenue officer's letter, fulfilling their tax obligations is not a detriment for which equitable estoppel provides relief. Kennedy v. United States, 965 F.2d at 419. Further, shielding the taxpayers from the levy would grant the taxpayers a windfall rather than prevent harm to them. See United States v. Asmar, 827 F.2d at 915.

Finally, it appears that the Service's actions in this case did not rise to the level of "affirmative misconduct". Although this term has not been fully defined by governing case law, the courts have determined that, at a minimum, it requires actions which are beyond mere negligence. Id. Further, to meet this standard, there must be an affirmative misrepresentation or concealment of a material fact. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989).[6/]

Considering the facts presented herein, we believe that the revenue officer's actions do not rise to the level of affirmative misconduct. It appears that the revenue officer never promised the taxpayers that the Service would abate or otherwise compromise the subject liabilities. Instead, his letter merely indicated that he would release the lien against the taxpayers property if they paid him the realizable equity in it. Although the letter fails to identify the exact taxable periods related to

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[6/] Affirmative misconduct does not require intent to mislead a taxpayer. Id.

the proposed lien release, this failure appears to be mere inadvertence, well below the standard for "affirmative misconduct".

In addition, the taxpayers' belief that all of the liabilities would be abated when they paid the Service $[redacted] apparently resulted from their mistaken belief about the ramifications of releasing an IRS lien, not any affirmative actions by the revenue officer. The revenue officer's complicity in this case resulted from his failure to clearly state the effect of releasing the Service's liens and not from any misrepresentation or concealment. Thus, they cannot show the necessary elements of "affirmative misconduct" entitling them to relief. As the Supreme Court has stated: ...those who deal with the government are expected to know the law and may not rely on the conduct of the government agents contrary to the law." Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984).

In addition, for many of the reasons cited above, the Service is not obligated to release the tax liens for the [redacted] and [redacted] liabilities. The taxpayers do not have a contractual right requiring the Service to release the liens as the revenue officer lacked authority to release the liens in the absence of full payment of the liabilities. I.R.C. § 6325(a)(1) allows for the release of the federal tax lien only if the underlying liability is paid, the lien is legally unenforceable or the taxpayer posts a bond. Moreover, it appears that at the time of the revenue officer's letter, only the Chief of Collection and Chief of SPf were authorized to release a lien when a tax liability was compromised.[1/]

Further, as discussed above, the taxpayers cannot raise equitable estoppel as a defense against the Service enforcing its lien rights. The revenue officer's lack of authority for releasing the liens made it unreasonable for them to rely upon his letter as a basis for believing the [redacted] lien would be released. In addition, they could not reasonably rely upon the revenue officer's letter for believing that the [redacted] lien would be released because the lien was not even filed when the letter was written. Moreover, as discussed above, there is no evidence that they suffered a legal detriment by relying on the revenue officer's representation that the liens would be released.

[1/] We could not locate any delegation orders in effect at the time delegating this authority to revenue officers. The local delegation order presently in effect does not provide for this.

Instead, it appears that they merely paid off a portion of their tax liabilities which they already owed.[8/]

Besides being unable to prevent the Service from collecting the liabilities, the taxpayers may not be entitled to contest the Service's liens filed through a collection due process hearing as any such request is untimely. A collection due process hearing is unavailable to contest the [redacted] lien as it was filed long before the collection due process hearing procedures were implemented. For the [redacted] lien, the taxpayers request for a collection due process hearing was untimely as they failed to file their request until [redacted], more than 35 days after the lien was filed. I.R.C. § 6320; Treas. Reg. § 301.6320-1T(b)(2), Q.& A. B1. [9/]

Finally, although the Service may enforce its lien against the property, we recommend that it consider subordinating its lien to the mortgage granted to [redacted]. This will prevent this entity from being unfairly harmed by the revenue officer's actions and will allow the Service to enforce its lien against any equity in the property remaining after [redacted]'s debt is satisfied.[10/] (b)(5)(DP) [redacted]

[8/] Because the revenue officer's letter stated that the IRS lien would be released upon payment of the $[redacted], the revenue officer may have committed "affirmative misconduct" with regard to the lien filed for the [redacted] liability. Even this is unclear, however, as the letter is vague about the taxable periods involved. In any event, because of the other reasons discussed herein, the taxpayers nevertheless fail to qualify for relief from this lien even if they establish that the revenue officer committed affirmative misconduct by issuing the letter.

[9/] However, Appeals should grant the taxpayers an equivalent hearing to consider this issue. Id. Unlike with a collection due process hearing, Appeals' determination reached in an equivalent hearing is not appealable to the Tax Court. Treas. Reg. § 301.6320-1T(i), Q. & A. 15.

[10/] In Boseley v. United States, 1990 U.S. Dist. LEXIS 19810 (E.D. Wa. 1990), the court prevented the Service from enforcing its lien rights against property sold to a third party on the basis of equitable estoppel. In that case, it appears that the revenue officer had mistakenly represented to the purchasor that the liens were paid off.

(b)(5)(DP) [redacted].

As this concludes our action on this matter, we are closing our file. Should you have any questions or need further assistance, please contact me at (860) 290-4068.

BRADFORD A. JOHNSON
Acting District Counsel

By: (Signed) John Aletta
JOHN ALETTA
Attorney